



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL PETITION NO. 12 OF 2020

**JAMES MUNYUA MUSA.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF MERU.....RESPONDENT**

**RULING**

1. The petitioner vide notice of motion dated 22<sup>nd</sup> July 2020 sought Sections 48 (3) (c) and 48 (4) of the Meru County Co-operative Societies Act No. 7 of 2014 be suspended pending the hearing and determination of this petition.

2. The application was supported by the sworn affidavit of **James Munyua Musa** who averred that he is the current chairman of *Kianjuri Farmers' Cooperative Society* registered under the Cooperative Societies Act and affiliated to the New-Kenya Planters Cooperative Union. That the aforesaid provisions are in contravention of the national legislation which is the Cooperative Societies Act. In particular Section 48 (3) (b) which provides that a person shall not be a member of a committee if he has not attained a Kenya Certificate of Secondary Education or its equivalent and Section 48 (4) which provides that a member of the management committee shall hold office for a period of three years and shall be eligible for re-election for a further and final term of three years after which a person shall not be eligible for election to the committee before the expiration of three years.

3. The application was opposed by **Catherine Kithinji**, the Chief Officer Department of Trade and Cooperative Societies of the Respondent. She averred that the Meru County Cooperative Societies Act was not in any way in conflict with the national legislation since the national legislation did not provide for any time limits or education qualifications. That in any event Article 191 of the Constitution provides for the way forward when there is a conflict between the county and national legislation on a matter that is fully devolved and *vice versa* with the said county legislation taking precedence over the national legislation in the case of conflict.

4. That before the presentation of the bill the same was reviewed by the Kenya Law reform Commission and thereafter presented to the house committees in the County assembly which took out public participation in line with the constitution and the Meru County Public Participation Act. That it is during the public participation that the issue of time limits arose a classical example being *Ntiminyakiru Society* which collapsed due to overstaying of their officials.

5. That the petitioner deliberately failed to appear during the public participation and has approached the court six years after the enactment of the legislation. That the provisions of Section 48 (3) (c) and Section 48 (4) were introduced so as to safeguard the interest of the members and to avert bad and incompetent leadership whenever it is apparent.

6. The Petitioner filed a further affidavit on 24<sup>th</sup> September 2020 sworn by **James Munyua Musa** stating that the petitioner is audited annually and at no instance has any query been raised by the regulatory bodies. That subject to Section 83 of the Meru Cooperative Society Act imposes a supervisory role on the directorate over cooperatives in the region which defeats the purpose of Section 48 (3) (c) and Section 48 (4). That the newspaper advertisement for public participation is undated hence one cannot verify its genuinity and as to whether the public was given reasonable time to attend to the public participation. That the attendance list of the members present during the public participation is undated and also not clear hence the claim that the Respondent facilitated public participation cannot be verified.

7. He further averred that the petitioner and other members of Cooperative societies were not consulted before the legislation was passed. That there are more than 300 registered cooperative Societies in Meru County. Therefore, the unreasonable and restrictive limitation imposed by the Act will have the effect of throwing into disarray the Order of Cooperative societies. That most of the elected officials in the aforesaid cooperatives societies have served two terms and thus by operation of law on 20<sup>th</sup> November 2020 they will stand dismissed resulting in the collapse of the cooperative movement.

8. His averment was supported by the sworn affidavit of **Francis Murithi Rimberia** Chairman of the board of management in *Solutions Savings and Credit Cooperative Society Ltd*. He averred that the society has 14 branches across seven counties. That it is challenging for the

society to operate in several counties if overlapping county cooperative societies' legislation were to prevail without reflecting the national cooperative policy and legislation. It was also his averment that the Society is regulated by the Sacco Societies Regulation Authority under the Sacco Societies Act, 2008 its membership is drawn across the country and as such it ought to regulate itself and move so with national legislation that applies across the country.

9. The same averment were supported by **Mark Gitonga Francis** of *Yetu Savings and Credit Cooperative Society Limited* and **Josephat Thaine Iburi** of *Amukui Farmers Coperative Society Limited*.

10. The application was canvassed by way of written submissions. The petitioner highlighted the test in the grant of conservatory orders from the cases of **Board of Management of Uhuru Secondary V City County Director Of Education & 2 others, Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR**. The petitioner submitted that the legislation was passed without public participation therefore by passing the sovereign will of the people as enshrined in Article 1 of the Constitution. On public participation he cited the cases of **Independent Electoral and Boundaries Commission (IEBC) V National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR**, **Robert. N. Gakuru & others v Governor of Kiambu County & 3 Others [2014] eKLR**. He also cited the case of **Francis Mbugua Mungai & 3 Others v Nakuru County Government [2018] eKLR** that the advert itself does not amount to adequate facilitation.

11. The Respondent restated the averments made in their affidavit. It also cited the provisions of **Article 232, 191 and 24 of the Constitution**. It also stated that the law was adhered to as provided under Section 23 of the County Government Act. The Respondent cited the case of **Kiambu County Government & 3 Others v Robert. N. Gakuru [2017] eKLR**, **Meru Bar, Wines & Spirits Owners Self Help Group v County Government of Meru [2014] eKLR**, **Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 Others [2018] eKLR**.

### Analysis and Determination

12. The scope of a conservatory order was highlighted by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:

**“[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”**

13. The Court in **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR** also went further to highlight the conditions to be met so as to satisfy the court to issue a conservatory Order when it held as follows;

**“Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice.....It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis.....Once the applicant has established to the court’s satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights.....Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice.....The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of **Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR** is that the court must consider conservatory orders also in the face of the public interest dogma.....Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless: see **Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others CP No. 11 of 2012** as well as **Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.....”****

14. The provisions that the petitioner seek to impugn in this petition are Sections 48 (3) (c) and 48 (4) of the Meru County Cooperative Societies Act which provide as follows;

**48. (1) The management of the co-operative society shall vest in a committee consisting of not less than five and not more than nine members.**

**(2) The committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-laws of the co-operative society, direct the affairs of the co-operative society with powers to-**

**(a) enter into contracts;**

**(b) institute and defend suits and other legal proceedings brought in the name of or against the co-operative society; and**

(c) do all other things necessary to achieve the objects of the co-operative society in accordance with its by-laws.

(3) A person shall not be a member of a committee if he-

(a) is not a member of the co-operative society;

(b) is under eighteen years of age;

(c) has not attained a Kenya Certificate of Secondary Education or its equivalent;

(d) receives any remuneration, salary or other payment from the co-operative society save in accordance with this Act;

(e) is a committee member in two other co-operative societies;

(f) being a member of a co-operative society that lends money to its members, lends money on his own account;

(g) being a member of a co-operative society which trades in goods or produce, trades either on his own account or some other person's account in the same type of goods or produce;

(h) has not, within thirty days of being appointed, declared his wealth to the directorate in the Societies prescribed manner;

(i) is an undischarged bankrupt;

(j) is of unsound mind;

(k) has been adversely named by the directorate in an inquiry report adopted by a general meeting for mismanagement or corrupt practices while a member of the committee;

(l) has been convicted of any offence involving dishonesty or is sentenced to imprisonment for a term exceeding three months;

(m) has been convicted of any offence under this Act or rules made thereunder;

(n) has any uncleared debt owing to a co-operative society at the end of its financial year other than in respect of a loan under the provision of any rules made under this Act;

(o) is a person against whom any amount of money is due under a decree, decision or order or is pending recovery under this Act.

(4) A Member of the Management Committee shall hold office for a period of three years, and shall be eligible for re-election for a further and final term of three years, after which the person shall not be eligible for election to the Committee before the expiration of three years. [Emphasis Mine]

15. The applicant has anchored his prayers on the fact that due procedure was not adhered to before the Meru County Cooperatives Act was enacted. Exceptionally, he submitted that there was no public participation and/or the relevant players in the cooperative societies were not informed of the process. In **Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] Eklr** the Court Held as follows on the aspect of public participation;

**“I must say that public participation ought not to be equated with mere consultation. Whereas “consultation” is defined by Black’s Law Dictionary 9th Edn. at page 358 as “the act of asking the advice or opinion of someone”, “participation” on the other hand is defined at page 1229 thereof as “the act of taking part in something, such as partnership...” Therefore public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public....”**

16. The Court further observed;

**“..However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations.....”**

17. I have looked at the advertisement and the list of members present during the public participation. I am familiar that section 87 of the County Government Act 2012 establishes the principles of citizen participation in counties while section 88 of the County Government Act establishes the modalities and platforms for citizen participation. Sections 94, 95 100 and 101 of the County Government Act provide that counties are to establish mechanisms to facilitate public communication and access to information with the widest public outreach using media and that county governments should create an institutional framework for civic education.

18. The issue raised by the petitioner is a salient issue. Whereas it was not the Responsibility of the Respondent to reach each and every individual, I find that the documents presented by the Respondent as the considerable steps taken in the spirit of public participation ought to be interrogated further. The case of **Meru Bar Wine & Spirit Owners Self Help Group v County Government of Meru [2014] EKLK** cited by the Respondent is distinguishable to this case since the same the Respondent in the case had taken out an advertisement, posted in its website and held eight separate public participation forums.

19. Another pertinent issue raised by the Petitioner is whether the enactment of the act fell within the purview of Article 191 of the Constitution. Article 191 provides as follows;

**Article 191** of the **Constitution** provides as follows;

**(1) This Article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.**

**(2) National legislation prevails over county legislation if—**

**(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or**

**(b) the national legislation is aimed at preventing unreasonable action by a county that—**

**(i) is prejudicial to the economic, health or security interests of Kenya or another county; or**

**(ii) impedes the implementation of national economic policy.**

**(3) The following are the conditions referred to in clause (2)**

**(a) —**

**(a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;**

**(b) the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—**

**i. norms and standards; or**

**ii. national policies; or**

**(c) the national legislation is necessary for—**

**(i) the maintenance of national security;**

**(ii) the maintenance of economic unity;**

**(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;**

**(iv) the promotion of economic activities across county boundaries;**

**(v) the promotion of equal opportunity or equal access to government services; or**

**(vi) the protection of the environment.**

**(4) County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) apply.**

**(5) In considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict.**

**(6) A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the**

**inconsistency.**

20. A formative question to be argued is whether the Meru Cooperative Societies Act prevails over the provisions of the Cooperative Societies act and if the circumstances in clause (2) arise in the Cooperative Societies Act. The issue of public participation and the applicability of Article 191 of the Constitution to the mind of this court raise a prima facie case and are not in any speculative.

21. I have also scaled the time of bringing the petition, i.e. 6 years after the Act was enacted and weighed the same with public interest and whether the petitioner's grievance is genuine and/or legitimate. The petitioner holds the position of chairman of *KianjuiFarmers Cooperative Society Ltd*. He has so far shown that his interest and those of other elected officials within Meru County stand to be prejudiced hence affecting the stability of the Cooperative Movement within the region. He places the adverse effects coming into effect by operation of the law on 20<sup>th</sup> November 2020.

22. As I have alluded earlier the petitioner raises genuine and legitimate grievances. I however, hold fort to the equity maxim that ***equity aids the vigilant and not the indolent***. The same is not applicable to this case. The applicant has made the application at the neigh of their electioneering period. He has not stated why he was not familiar to the Act and/or why it has taken him such a long time before presenting the current petition.

23. It is not also bereft to this court that the petitioner may also move with speed to hold elections that would move his terms to further years escaping the provisions of Section 48 of the act for unascertained future. Another lingering scenario is the adverse effects that the conservatory Order may have, and as a matter of public interest to the other cooperative societies who are not party to this suit. Suspending the provisions of the act at this stage will affect the current status which are the gains achieved by the Respondent during the last six (6) years and the years prior to the enactment of the Act. This gains clearly supersede the interest of the petitioner at this interlocutory stage.

24. The issues raised by the petitioner are also best addressed at an inter parties stage where through the dictate of the court on how best to proceed with the petition each party will lay out their evidence in support of their respective cases.

25. With the above determination in mind I safely find that the application dated 22<sup>nd</sup> July 2020 lacks merit and the same is therefore dismissed.

**HON ANNE ADWERA ONG'INJO**

**JUDGE**

**RULING DATED AND DELIVERED BY EMAIL AT MERU ON 29<sup>TH</sup> DAY OF OCTOBER 2020**

**HON ANNE ADWERA ONG'INJO**

**JUDGE**